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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 722

SALVATORE ARNONE and ANTONIO PINTO,

Petitioners,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF NEW YORK

JAFFE and FELDMAN
Attorneys for Petitioners
225 Broadway
New York, N. Y. 10007

Of Counsel:
EUGENE FELDMAN

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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THE PEOPLE OF THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners pray for a writ of certiorari to review the judgment of the Appellate Division, Second Department of the Supreme Court in the State of New York, entered in the above entitled case on April 18, 1966 (— A.D. 2d —, 270 N.Y.S. 2d 381).

Opinion Below

The opinion of Honorable Joseph M. Conroy, Judge of the Supreme Court of the State of New York, dated April 29, 1963, denying petitioners' motion to vacate a search warrant and to suppress the evidence seized thereunder is unreported and is appended hereto, *infra*, at page A1.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3). An order, without opinion, denying petitioners' motion to vacate the search warrant and to suppress certain evidence seized thereunder pursuant to New York Code of Criminal Procedure, Section 813-c was entered on April 18, 1966, by the Appellate Division, Second Department of the Supreme Court of the State of New York. Leave to appeal to the Court of Appeals of the State of New York was denied by the Honorable Adrian P. Burke on July 1, 1966. Application for an extension of time in which to file this petition from September 28, 1966 up to and including October 26, 1966 was granted in an Order issued by Mr. Justice Harlan, dated September 23, 1966.

Questions Presented

1. Whether a failure of a search warrant to describe the particular premises which was searched constitutes a deprivation of the protection of the Fourth Amendment to the United States Constitution?

2. Whether there are standards governing particularization of the place to be searched described in the search warrant sufficient to meet the requirements of the Fourth Amendment to the United States Constitution?

3. Whether a search is valid under the Fourth Amendment to the United States Constitution which is based upon alleged probable cause obtained subsequent to the issuance of a search warrant and without knowledge of any Court or Judge of the purported "probable cause?"

Constitutional and Statutory Provisions Involved

1. This case involves the Fourth Amendment to the United States Constitution.

2. Section 813-c of the Code of Criminal Procedure of the State of New York is also involved:

> SECTION 813-C OF THE CODE OF CRIMINAL PROCEDURE
>
> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, paper or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence on any issue of fact necessary to the determination of the motion.
>
> If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible as evidence in any criminal proceeding against the moving party.
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

Statement

Prior Proceedings

Petitioners were charged in a four count indictment by a Grand Jury in Queens County in the State of New York of the crimes of operating a policy business, in knowingly keeping a place for receiving written records of more than

a hundred plays or bets; operating a policy business in knowingly receiving in one day written records of more than one hundred policy wagers; keeping a place to be used for policy playing; and possession of policy slips (R. 5-7).

On April 16, 1963, petitioners filed a Notice of Motion to controvert a search warrant obtained herein and to suppress evidence obtained thereunder in violation of their rights under the Fourth Amendment to the United States Constitution (R. 32, 33). A hearing on the aforesaid motion was held before Justice Joseph M. Conroy of the Supreme Court of the State of New York, on April 16, 1963 (R. 40-57). The motion was denied by opinion and order dated April 29, 1963 (R. 62-64 reprinted A1, *infra*).

Thereafter petitioners pleaded guilty to the crime of attempting to commit the felony of operating a policy business in violation of Section 974b of the Penal Law, of the State of New York, without in any way, prejudicing their rights under Section 813-c of the New York Code of Criminal Procedure to resist upon appeal the aforesaid intermediate order of Justice Joseph M. Conroy dated April 29, 1963 (R. 15-22).

Petitioner Salvatore Arnone was sentenced to a term of one year, three months to five years in the State Prison and Petitioner Antonio Pinto was sentenced to one year, three months to two years in the State Prison with execution of both sentences stayed during good behavior (R. 31).

On appeal to the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, the conviction was affirmed without opinion on April 18, 1966. Leave to appeal to the Court of Appeals in the State of New York was denied by Hon. Adrian P. Burke, Associate Judge, on July 1, 1966.

Evidence Presented at Hearing on Motion to Suppress

Detective John Macauley:

Detective John Macauley of the New York City Police Department testified that he submitted an affidavit to Judge Francis X. O'Brien on October 26, 1962, in support of an application for a search warrant to search premises 40-66 97th Street, Queens, "a basement apartment thereat" (R. 42-43). A copy of the affidavit which was marked as petitioner's Exhibit "A" in evidence (R. 57-59) described the premises to be searched as "the first floor rear apartment" "believed to be occupied by Frances Arnone". No other officer or other witness submitted any additional affidavits in support of the application for the search warrant, nor was there any oral testimony offered in support of the application for the warrant (R. 43, 44). The search warrant, issued by Judge O'Brien on October 26, 1965, (defendants' Exhibit "B" in evidence) (R. 60), also described the premises to be searched as the first floor rear apartment.

Detective Macauley testified that prior to making his application for the search warrant he had, on October 23, 1962, approached an unknown male on 94th Street and 2nd Avenue in the Borough of Manhattan, at about 1:15 P.M. and had placed a bet which was accepted by this unknown male, who placed the money given in his pocket and placed the slip given in a brown paper bag (R. 45, 46). Subsequent thereto he saw this unknown male have numerous conversations with other males and females and thereupon walk to 92nd Street and York Avenue and meet with petitioner Pinto (R. 46), who received the brown paper bag from this unknown male (R. 46). Pinto then entered an automobile and drove to the vicinity of 40-66 97th Street, Corona (R.

47) which premises he entered while carrying a newspaper and a paper bag (R. 47-48). Similar observations by Detective Macauley were made on the 24th, 25th and 26th of October (R. 48).

The premises at 40-66 97th Street, Corona, Queens consisted of a four-family house (R. 48). Detective Macauley did not see what portion of these premises petitioner Pinto entered until his observations on October 25th when he saw him go "to the apartment of the rear of the 1st floor" (R. 48). Thereafter, on October 26, he obtained the search warrant described above authorizing him to search the first floor rear apartment of these premises. On that day he testified he saw petitioner Pinto meet this unknown male at 92nd Street and York Avenue and drive to 40-66 97th Street and enter the premises. He was directly behind petitioner and saw him walk the length of the hall, make a left hand turn and enter a door there which the detective subsequently learned led downstairs to the basement apartment (R. 49, 50, 54). There was a direct entrance to this basement apartment through the rear yard (R. 54). Detective Macauley knocked on the door which he had seen petitioner Pinto enter, announced that he had a search warrant and upon receiving no response opened the door which was closed but not locked, proceeded to the basement apartment and conducted a search (R. 50, 53). He did not conduct a search of the first floor rear apartment (R. 50). Detective Macauley admitted that he entered the basement apartment and conducted a search thereof not because he had seen a crime committed in his presence but for the purpose of executing the search warrant (R. 50, 53).

Reasons for Allowance of Writ

1. The denial of this motion to suppress is an excellent example of the inadequate protection afforded at both the federal and state judicial levels of the guarantee of the Fourth Amendment that no search warrant shall issue without "particularly describing the place to be searched."

Despite the constitutional prerequisite making necessary specificity in describing the premises for which a valid search warrant may issue, this Court has in one instance considered a case in which this requirement was involved. The standards delineated in *Steele* v. *United States, No. 1,* 267 U.S. 498 (1924), have been frequently relied upon not only within the limited context of the factual questions raised by the warrant therein but also in cases similar to this one where the factual situation is vastly disparate. While the warrant in *Steele* was challenged as being too general in its description of the premises to be searched, the warrant here did not describe the premises searched in executing the warrant.

The *Steele case* involved the validity of a warrant which sought the right to search any buildings or rooms connected or used in connection with a commercial garage where the entire premises was leased by defendant. In holding this description constitutionally adequate this Court said:

> "It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended" (267 U.S. at p. 503).

It is petitioners' contention that in the forty-odd years which have elapsed since *Steele,* lower courts on the whole, when faced with the constitutional sufficiency of premises descriptions in search warrants, have tended to erode the effectiveness of the constitutional requirement of particularity of description and thus have threatened the right of the citizen to privacy in home or business. *McDonald* v. *United States,* 335 U.S. 451 (1948); *Brown* v. *United States* (CCA 3rd, 1936), 83 F. 2d 383.

Broadly speaking, the cases in which descriptions of premises in search warrants have been challenged fall into two basic categories:

1. Those in which the warrant or the execution thereof is challenged as describing premises too generally and broadly (e.g. cf. *Sasser* v. *United States,* 227 F. 2d 358 (5th Cir. 1955); *Fine* v. *United States,* 207 F. 2d 324 (6th Cir. 1953) cert. denied 346 U.S. 923, where the description held adequate with *United States* v. *Thomas,* 216 F. Supp. 942 (N.D. Cal. 1963) where the description was held not to justify searching another building on the premises.

2. Those in which the warrant does not describe the premises which in fact were searched (e.g. cf. *United States* v. *Joseph,* 174 F. Supp. 539 (E.D. Pa. 1959); *United States* v. *Pisano,* 191 F. Supp. 861 (S.D.N.Y. 1961); *United States* v. *Contee,* 170 F. Supp. 26 (D.C. 1959) where search of premises other than those described in warrant held harmless due to minor error and with *Keiningham* v *United States,* 287 F. 2d 126 (D.C. Cir. 1960); *United States* v. *Barkouskas,* 38 F. 2d 837 (M.D. Pa. 1930) where product of such a search was suppressed as evidence.

Judicial holdings on the state level reveal a more consistent tendency on the part of the courts to uphold warrants broadly worded or executions at variance with the description in the warrant. E.g. *People* v. *Smith*, 20 Ill. 2d 345 (1960) (confusion over apartment designation held unimportant). *Davis* v. *Oklahoma*, — Okla. — 280 P. 2d 749 (1955) (although description of premises in warrant not complete, search valid); *Hatchett* v. *State*, 208 Tenn. 399 (1961) (inaccurate description of location of premises held harmless); *State* v. *Daniels*, 46 N.J. 428 (1966) (error in street address and in nature of business conducted at premises held harmless). *People* v. *Estrada*, 44 Cal. Rptr. 165 (1965) (no apartment number in warrant held not fatal).

In the cited cases the courts have articulated an inclination to sustain the search warrant so long as in its execution the law enforcement officer did not in fact intrude upon an innocent party.

In reaching the conclusion that such searches under such warrants are valid under the Fourth Amendment the courts have in most instances expressly relied upon the "authority" of this Court's holding in *Steele* or have employed reasoning identical to that used in *Steele* without specific reliance upon it.

Petitioners do not attempt to distinguish the facts involved in the cited authorities from those in the case at bar, although in many instances there are important technical distinctions. Rather petitioners contend that these holdings—similar to the one at issue here—supply graphic evidence that it is clearly time for this Court to consider afresh the language of the Fourth Amendment with refer-

ence to particularity of description and to supply guidelines which will halt the tendency of lower courts to allow and indeed encourage careless and incomplete police work at the expense of the citizen's right to his privacy.

Therefore mere labeling variance between warrant and execution thereof as 'technical' is to avoid grappling with the vital question of allowing such variance to stand. There is no question that these variances create unwarranted intrusion upon individual's right of privacy.

> "All law is technical if viewed solely from concern for punishing crime without heeding the mode for which it is accomplished." *Bollenbach* v. *United States,* (1945) 326 U.S. 607, 614.

The question is not whether there is or is not an Apartment "A" as the court reasoned in *Contee* or whether the officers were justified in mistaking No. 31 for No. 35 as in *Daniels* or whether there is a first floor rear apartment in the instant case. The question is whether this Court should allow warrants of this nature to stand and, in turn, whether the standard, as applied in some of our State Courts and in some of our Circuits, affords adequate protection to a person who resides in Apartment "A" or whose store is located at No. 31 or who occupies the first floor rear apartment. In this case the officer executed the warrant, exhibiting no hesitation about doing so, after discovering that he did not want to search the first floor rear apartment but rather wanted to descend a flight of stairs, the entrance to which was at the left of the first floor and searched a basement apartment. A search of the basement apartment occurred herein. It matters not that the basement apartment was the residence of the petitioners and not of others. The

fact that the recklessness, and we submit, the illegal behavior of the officer did not create a mere unfortunate situation does not alter the fact that the police officer proceeded without legal justification into the basement apartment and took an unnecessary chance of disturbing the privacy of unknown persons.

The time has come to discourage effectively such an attitude on the part of law enforcement officials. It is clearly worth noting that in the case cited and in the many others in this area carelessly drawn warrants have been upheld where the suspected crime consisted of liquor and gambling law violations. As was stated by Mr. Justice Jackson in *McDonald* v. *United States, supra,* page 459:

> "While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this court to be unlawful dealt with that category of crime. Almost without exception, the overzeal was in suppressing acts not malum in se but only malum prohibitum. While the enterprise of parting fools from their money by the "numbers" lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures."

There are disputes among the various jurisdictions concerning the interpretation of *Steele* over the past forty years since its decision. The sophistication of police officers and the sophistry of some courts has twisted the specificity requirements of the description of the premises sought to be searched of the Fourth Amendment to the United States

Constitution. This court has refused to validate a "general" search warrant (*Stanford* v. *Texas*, 379 U.S. 431 (1965) and *Marron* v. *United States*, 275 U.S. 192 (1927). Particularly in our urban society, where so many people reside in multiple dwellings the authority to enter any and all premises, once inside the multiple dwelling, must be curtailed. To that end, guidance is necessary for law enforcement officers and for the courts granting this authority.

2. Despite the clear trend toward allowing search warrants to stand where premise descriptions differ from the premises actually searched, there is indication of a certain conflict among the lower courts where, as here the premises are residential and more than one family may reside therein. This Court has never considered what standards should govern in this situation. In *Steele* where defendant was the sole owner of the premises broadly described in the warrant there was little likelihood that a wide search would impinge upon the privacy of persons totally uninvolved with the suspected crime for which the warrant was sought and issued. However, where the premises involved are multiple dwellings and failure to specifically describe the premises to be searched is more likely to threaten the security of other tenants in the privacy of their homes, some lower courts have vacated warrants when they failed to describe with adequate particularity the specific apartment to be searched. For example, in *United States* v. *Hinton*, 219 F. 2d 324 (7 Cir. 1955) the court invalidated a warrant which authorized a search of an entire three-story apartment house, including its basement, because the affidavit upon which the warrant was based, failed to show justification for such a wide-ranging search, pointing out at page 326:

> ". . . the fact that no harm was done would not validate a warrant invalid because of its failure to 'particularly' describe the place to be searched."

Similar concern for the effect on the rights of others was voiced by the court in *United States* v. *Barkouskas,* 38 F. Supp. 837 (M.D. Pa. 1930) where the warrant described the two story premises to be searched as a bar and drinking rooms respectively and, upon execution, it was learned that the second floor was, in fact, occupied by persons other than defendant. Although upon being so advised the officer only searched the first floor where he seized whisky illegally possessed by the defendant, the court nonetheless granted the motion to vacate and suppress, reasoning

> ". . . . we were not concerned with that which happened after the search warrant was issued. We are concerned only with the search warrant itself and the authority it gave the officer to whom it was directed. It gave him authority to search the house of an innocent person without any attempt to show probable cause . . . ."

The warrant must speak as of the time it was issued. Subsequent events can neither narrow its authority nor extend it (*Sgro* v. *United States,* 287 U.S. 206, 211 (1932) and *Nathanson* v. *United States,* 290 U.S. 41, 47 (1933)).

The officer, in his search involved herein took upon himself authority which he did not have. His authority was limited to the search of the first floor rear apartment of the premises. He admittedly did not search the first floor rear apartment of the premises. He searched, instead, the basement apartment.

In *Keiningham* v. *United States*, 287 F. 2d 126 (D.C. Cir. 1960) the executing officer was similarly independent. The search warrant authorized a search of No. 1106 18th St. N.E., one of a group of row houses connected by a party wall. The officers on several prior occasions and on the day of execution of the warrant had observed defendants—known gamblers—entering No. 1106 and on that day blocked their path of exit from that house and followed them into the premises. When they found 1106 to be vacant they located evidence of a newly constructed connecting entrance between Nos. 1106 and 1108, knocked on the wall and upon receiving no answer entered and found defendants and the illegal material described in the warrant to be in No. 1108. In rejecting the government's contention that the variance between the warrant and the execution thereof was a technical one and that in view of defendants' construction of the panel between the two houses they should be treated as one unit the court said at page 129:

> "We know of no clause in the warrant issued extending the authority granted them in the event of unforeseen circumstances, and it is well settled that search warrants must be strictly construed. The authority to search is limited to the place described in the warrant and does not include additional or different places."

However, not all the lower courts have been similarly concerned where no injury resulted from searches made in mutiple dwellings on the bases of erroneous premise descriptions in the warrant. For example, in *United States* v. *Evans*, 320 F. 2d 482 (6 Cir. 1963) the Sixth Circuit reached an opposite conclusion in a case similar in the facts to *Keiningham*. In *United States* v. *Santore*, 290 F.

2d 51 (2nd Cir., 1960), cert. den. 365 U.S. 834 and *United States* v. *Poppitt* (C. D.C. D. Del., 1964), 227 F. Supp. 73, the warrants described the premises to be searched as one family houses where in fact they were each occupied by two families. In both cases the warrants and executions were upheld, the courts emphasizing the fact that in procuring the warrants the officers had had probable cause to believe the premises to be one family houses and did not search the homes of the second family. In *Santore,* where the search and arrest were part of a large scale narcotics 'crackdown' the court felt that, if the officers had left and had obtained a new warrant when they discovered the error in the one they were attempting to execute, they would have failed to conclude their "mission". Parenthetically, it should be pointed out that Macauley, the officer involved herein, was faced with no such dilemma. By his own testimony petitioners were not aware of his presence prior to his entry into the basement apartment and did not commit a crime in his presence. Thus he could have left the premises and secured a new warrant authorizing the search he intended to make without jeopardizing his "mission."

In its opinion denying petitioners' motion to vacate and suppress, the Supreme Court of Queens County pays "lip service" to the special problem arising where search warrants covering multiple dwellings are involved. It clarifies its reliance upon *Steele* by citation of cases in which such search warrants have been upheld or would have been upheld had the warrant recited the name of the person whose apartment was to be searched. *United States* v. *Barkouskas, supra,* and *United States* v. *Wihinier,* (D.C. W.D. Wash., 1922), 284 F. 528. However, in the case at bar no mention

is made in the warrant of the identity of the occupant of the first floor rear apartment and in his supporting affidavit the officer avers only "This apartment (first floor rear) believed to be occupied by Frances Arnone" (R. 58) without reciting any basis for this belief. No mention of Frances Arnone appears in the hearings and in fact the apartment was apparently occupied by petitioners Salvatore Arnone and Antonio Pinto. In a four family house it is a distinct possibility that Frances Arnone—if there be such a person—may occupy an apartment separate from that of Salvatore Arnone. Similarity of surname of tenant is not sufficient to equate the basement apartment with the first floor rear apartment. In any event, the warrant which is the instrument to be executed gave no clue as to who the occupant of the partment sought to be searched might be and thus the cases relied upon by the hearing court are inapplicable.

There was no probable cause, nor any cause demonstrated as to the search of any apartment of Arnone whether his name be Frances or Salvatore. The sole information supplied is that the petitioner Pinto entered premises, 40-66 97th Street, on four or five separate occasions. No where is it alleged that he entered the apartment of Salvatore Arnone. No where is it alleged that Frances Arnone is in anyway involved with petitioner Pinto. "In passing on the validity of the warrant the review court may consider only the information brought to the Magistrate's attention." *Aguilar* v. *Texas* (1964), 378 U.S. 108, 109, footnote I. A search warrant to be valid should be strictly on probable cause. Failing this, a warrant is void, probable cause can only be determined "from the facts and circumstances presented to him (the Judge) under oath or affirmation."

Nathanson v. *United States, supra,* page 47. There was either no probable cause for the search involved herein as is set forth hereinbefore and hereinafter or there was a lack of specificity in the warrant which allowed the search to be made; which lack of specificity made the warrant invalid.

The type of specificity and accuracy called for where the premises to be searched are located in multiple dwellings was well summed up more than thirty years ago:

> "In those cases for example, which hold a warrant to be valid which directs a search of an apartment house or other building occupied by divers persons, the particular part of such apartment house or building is by limitation confined either to premises therein occupied by a certain stated person or persons, or by designation of a certain part of the building." *United States ex rel. Sunrise Products Co.* v. *Epstein* (D.C.E.D.N.Y. 1929), 33 F. 2d 982.

Neither of these requirements was met by the warrant in the instant case. Under the present status of judicial holdings in this area the laxness permitted by the court below is not surprising. It is however an illustration of the dangers implicit in such an approach and as such an apt case for this court to consider and to use as a basis of clarifying the law in this area.

3. The New York State courts' rejection of petitioners' motion to suppress not only undermines the requirement of the Fourth Amendment that premises be described with particularity but also undercuts that Amendment's requirement that search warrants not issue unless there be "probable cause" for searching the premises described.

This "probable cause" may only be determined from "facts or circumstances presented to (the judge) under oath and affirmation." *Nathanson* v. *United States*, 290 U.S. 41, 47 (1933). In *Sgro* v. *United States*, 287 U.S. 206, 211 (1932) the Court noted "The proofs supplied (for the issuance of the warrant) . . . *must speak as of the time of the issue of that warrant*" (emphasis supplied). It is beyond dispute that the question of whether probable cause exists must be determined by the issuing court—certainly *prior* to execution of the warrant and as a prerequisite to its issuance—and not by the officer executing it. *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Matter of Rossenwasser Bros.*, 254 Fed. 171, 173 (D.C. 1918).

The record below provides an excellent example of the wisdom of the requirement that prior determination of probable cause be made by a disinterested person. At the time application was made for this warrant and at the time of its issuance, Detective McCauley advised the issuing court of those facts which he believed constituted probable cause for searching the first floor rear apartment of the premises in question. These facts consisted of his having seen petitioner Pinto go to the first floor rear apartment on the previous day and of his "belief" stated without source that this apartment was occupied by one Frances Arnone. Subsequent to the issuance of the warrant, but prior to its execution, and in the process of its execution, Detective McCauley saw petitioner Pinto enter a door in the premises which led, not to the first floor rear apartment, but to the basement apartment, and he proceeded to execute the warrant within the basement apartment.

Since there was nothing in the warrant which described the basement apartment the purported "probable cause" for searching that apartment could only have arisen from events arising between the issuance and the execution of the warrant. This intervening cause must have been the fact that petitioner Pinto entered a door in the premises which the detective subsequently learned led to the basement. There is no more justification for sustaining an execution based upon this type of evidence than there would be for approving a search of any area which lay behind any door which petitioner may have chosen to enter at the time the detective decided to conduct a search. The effect of the decision below is to make unnecessary the existence of any search warrant, and to allow a police officer, intent upon seizing contraband he suspects to be present, to violate the rights of others—albeit unintentionally—in the process.

Constitutional rights must not yield to such exigencies of the moment. Essential to the protection of the basic constitutional right of privacy is the requirement that probable cause be determined by a neutral and detached magistrate prior to the search rather than by the officer engaged in the often competitive enterprise of ferreting out crime. *Aguilar* v. *Texas, supra, Johnson* v. *United States,* 333 U.S. 10, 14 (1948); *Giordenello* v. *United States,* 357 U.S. 480, 485 (1957); *United States* v. *Lefkowitz,* 285 U.S. 452, 463 (1932).

There is no dispute that in the affidavit upon which the search warrant was obtained no probable cause was shown to search the basement apartment; at the time he obtained the warrant Detective McCauley did not know he

would subsequently desire to search that apartment; his desire to do so arose only at the time he was attemping to execute the warrant. It is undisputed that the validity of a warrant depends upon its contents which in turn speak as of the time it was issued. *Aguilar* v. *Texas, supra; Stanford* v. *Texas,* 379 U.S. 431 (1965); *Johnson* v. *United States,* 333 U.S. 10 (1948).

We submit that upon the basis of the record herein the execution of the warrant was without legal basis and that to sustain it, violates the requirement of the Fourth Amendment and this Court's decisions thereunder. There must be "probable cause" to search the premises described in the warrant:

> "Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law." *Johnson* v. *United States,* 333 U.S. 10, 17 (1948).

CONCLUSION

Wherefore, for the reasons herein above stated, it is respectfully submitted that this petition should be granted.

JAFFE and FELDMAN
Attorneys for Petitioners

Of Counsel:
EUGENE FELDMAN

APPENDIX A

Opinion of Conroy, J., Denying Motion to Suppress

SUPREME COURT

QUEENS COUNTY

CRIMINAL TERM—PART I

Ind. No. 1773—62

THE PEOPLE OF THE STATE OF NEW YORK,

v.

SALVATORE ARNONE,

ANTONIO PINTO,

Defendants.

By JOSEPH M. CONROY, *J.*

Dated April 29th, 1963

A hearing was held on April 16, 1963 (1) for an order to vacate a search warrant issued October 26, 1962, and the return of the property seized, and (2) to suppress the use of such property seized as evidence on the ground that said seizure was unreasonable and in violation of the IV Amendment of the United States Constitution.

Based upon the testimony and affidavit for the search warrant (Ex. A), the Court finds there was probable cause for the issuance of said warrant and that branch of the motion is denied.

The remaining issue is the legality of the search and seizure based upon the search warrant. The warrant

directed a search of premises 40-66 97th Street, 1st Floor rear apartment, Corona, Queens, occupied by Frances Arnone and others. The testimony at the hearing was that the entrance to the apartment in question was on the rear of the first floor of premises 40-66 97th Street, Corona, and that upon opening the door there was a flight of steps leading down to a basement apartment. In the basement apartment the detectives found both of the defendants together with written records of Mutuel Race Horse Policy and other gambling paraphernalia.

The petitioners argue that the basement of said premises is a separate and distinct area and cannot be said to form a part of or to be in any way related to the premises designated in the warrant to be searched, citing *U. S.* v. *Falcone*, 109 Fed. (2d) 579, 582; affd. 311 U. S. 205. A reading of that case does not strengthen the petitioners' position. It does state "A warrant must indeed be specific enough not to allow the officers latitude to search at their choice;" however it then goes on to state "All that is required is reasonable certainty of identification," citing *Steele* v. U. S., 267 U. S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757; *Chiaravalloti* v. *U. S.*, 7 Cir. 60 F. (2) 192; *Rose* v. *U. S.*, 8 Cir., 45 F. (2) 459.

There is no dispute that the *entrance* to the apartment was in the rear of the first floor of the premises. In addition, the two petitioners were co-lessees of the apartment whose entrance was in the rear of the first floor (see affidavit of Antonio Pinto, dated April 2, 1963, p. 1).

In *U. S.* v. *Barkouskas* (38 F. (2) 837, 838) the Court stated "(I)t has been held that a search warrant is valid which directs the search of an apartment house or other

buildings occupied by a number of different tenants, and states the name of the person occupying the apartment to be searched. Such a description is sufficient, as it 'particularly' points to a definite ascertainable place". In *U. S.* v. *Wihinier* (284 F. 528) it held that a search warrant was valid which gave the street number and city, the name of the person who was the occupant. In that case the premises was an apartment house.

In *Townsend* v. *U. S.* (258 F. (2d) 461), the Court stated "The warrant of search was directed solely to the premises and not to a person. The address specified was the correct address and street number of Townsend's residence. The warrant accurately identified and described it. The description was such as to enable the officer readily to find it. That is sufficient."

The test of the sufficiency of the description is whether it enables the officer executing the warrant to locate the place definitely and with certainty (74 A. L. R. 1418, 1500).

The motion is denied.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the decision and order to the attorney for the defendants.

JOSEPH M. CONROY,
J. S. C.

APPENDIX B

Order of Affirmance of Appellate Division

(Peo. v. Arnone)

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 18th day of April, 1966.

Present—Hon. HENRY L. UGHETTA,

Acting Presiding Justice.

" MARCUS G. CHRIST,
" L. BARRON HILL,
" SAMUEL RABIN,
" A. DAVID BENJAMIN,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

SALVATORE ARNONE,

Appellant.

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER

The above named Salvatore Arnone, defendant in this action having appealed to the Appellate Division of the Supreme Court from (a) a Judgment of the Supreme Court of the County of Queens, rendered on the 17th day of June,

Appendix B—Order of Affirmance of Appellate Division (Peo. v. Arnone)

1963, convicting him of attempted violation of section 971-a of the Penal Law as a felony, on his plea of guilty and imposing and suspending execution of sentence; and (2) from so much of an intermediate order of said court entered May 2, 1963 which denied after a hearing his motion to vacate a search warrant and to suppress evidence (Code Crim. Pro., Section 813-c) herein, and the said appeal having been argued by Mr. Peter J. Peluso of Counsel for the appellant and argued by Mr. Matthew Muraskin, Assistant District Attorney, of Counsel for the respondent, and due deliberation having been had thereon; and upon the decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered and Adjudged that the judgment of conviction and intermediate order so appealed from be and the same hereby are unanimously affirmed.

Enter:

HERMAN M. POGUL
Acting Clerk

APPENDIX C

Order of Affirmance of Appellate Division

(Peo. v. Pinto)

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 18th day of April, 1966.

Present:

HON. HENRY L. UGHETTA,
Acting Presiding Justice.

" MARCUS G. CHRIST,
" L. BARRON HILL,
" SAMUEL RABIN,
" A. DAVID BENJAMIN,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

ANTONIO PINTO,

Appellant.

ORDER ON APPEAL FROM JUDGMENT OF CONVICTION AND ORDER

The above named Antonio Pinto, defendant in this action having appealed to the Appellate Division of the Supreme Court from: (1) a Judgment of the Supreme Court of the County of Queens, rendered on the 17th day of June, 1963, convicting him of attempted violation of section 971-a of the

Appendix C—Order of Affirmance of Appellate Division (Peo. v. Pinto)

Penal Law as a felony, on his plea of guilty and imposing and suspending execution of sentence; and (2) from so much of an intermediate order of said court entered May 2, 1963 which denied after a hearing his motion to vacate a search warrant and to suppress evidence (Code Crim. Pro., Section 813-c) herein, and the said appeal having been argued by Mr. Peter J. Peluso of Counsel for the appellant and argued by Mr. Matthew Muraskin, Assistant District Attorney, of Counsel for the respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered and Adjudged that the judgment of conviction and intermediate order so appealed from be and the same hereby are unanimously affirmed.

Enter:

HERMAN M. POGUL
Acting Clerk.

APPENDIX D

Decision of Appellate Division

132 E. and 133 E. The People, etc., respondent, v. Salvatore Arnone and Antonio Pinto, appellants.

Appeal by defendants from: (1) a judgment of the Supreme Court, Queens County, rendered June 17, 1963, convicting each of them of attempted violation of section 974-a of the Penal Law as a felony, on their respective pleas of guilty, and imposing and suspending execution of sentence; and (2) as limited by their brief, from an intermediate order of said court, entered May 2, 1963, which denied after a hearing their motion to vacate a search warrant and to suppress evidence (Code Crim. Pro., § 813-c).

Judgment and intermediate order affirmed. No opinion. UGHETTA, Acting P.J., CHRIST, HILL, RABIN and BENJAMIN, JJ., concur.

April 18, 1966

[CERTIFICATION]

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION,

SECOND JUDICIAL DEPARTMENT,

Clerk's Office, Borough of Brooklyn, N. Y.

I, HERMAN M. POGUL, Clerk of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, do hereby certify that the foregoing is a copy of the decision made by said Court upon the

Appeal in the above entitled action, and entered in my office on the 18th day of April, 1966.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 18th day of October, 1966.

HERMAN M. POGUL
Clerk.

[SEAL]

APPENDIX E

Certificate Denying Leave to Appeal to Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

SALVATORE ARNONE and ANTONIO PINTO,

Defendants-Appellants.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to Section 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
July 1, 1966

ADRIAN P. BURKE
Associate Judge